Filed 7/24/19 P. v. Medina CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. VANESSA MEDINA, Defendant and Appellant.	B290889 Los Angeles County Super. Ct. No. BA463125

APPEAL from a judgment of the Superior Court of Los Angeles County, Renee F. Korn, Judge. Conditionally reversed.

Jack T. Weedin, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Shawn McGahey Webb, Supervising Deputy Attorney General, Kathy S. Pomerantz, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted defendant and appellant Vanessa Medina of second degree robbery. After the jury verdict, the trial court expressed concerns about Medina's mental health, and transferred the case for a hearing to determine her eligibility and suitability for the Los Angeles County Office of Diversion and Reentry mental health diversion (ODR program). The court suspended imposition of sentence, placed her on formal probation, and placed her in the ODR program. While Medina's case was pending on appeal, the Legislature enacted Penal Code section 1001.36, which created a pretrial diversion program for defendants with mental disorders.[1] Medina argues the mental health diversion program should apply retroactively. We agree and conditionally reverse.

PROCEDURAL BACKGROUND

An information charged Medina with second degree robbery (§ 211). Prior to trial, Medina was found eligible and suitable for the ODR program, but chose to go to trial instead of diversion. She was convicted by jury on May 7, 2018. After dismissing the jury, the court expressed concerns about Medina's flat affect throughout trial. The court stated it wanted to sentence her in the manner that would best benefit her future and was considering the ODR program. Medina's attorney filed a sentencing memorandum and attached exhibits indicating that in 2015 a medical examiner opined she was incompetent to stand trial because she suffered from schizophrenia with complex

---

1 All further undesignated statutory references are to the Penal Code.

delusions. On May 21, 2018, the court found her eligible for the ODR program, expressing its belief that she was a "perfect fit" for the program. At a sentencing hearing held on June 11, 2018, the court suspended imposition of sentence, placed her on three years formal probation, found her eligible and suitable for the ODR program, and placed her in it.

Effective June 27, 2018, the Legislature created a pretrial diversion program for defendants with diagnosed and qualifying mental disorders such as schizophrenia, bipolar disorder, and posttraumatic stress disorder. (§ 1001.36, subd. (a).) Medina appealed, claiming section 1001.36 applied to her retroactively because her case was not yet final.

FACTUAL BACKGROUND

Around 3:00 p.m. on November 23, 2017, Medina entered a store, opened a cooler, took two sodas, and left the store. Kyung Lan Kwon, who was working at the store, ran after Medina, asked her to pay or give back the sodas, and tried to grab the sodas from her hand.[2] Medina twisted Kwon's finger, pushed her to the ground, and struck her repeatedly. Officer Phillip Yu testified that on the day of the offense Medina behaved erratically, made statements that were not in response to his questions, was at times incoherent, and appeared to be talking to people who were not there. Officer Daniel Hayashi testified Medina alternated between yelling and speaking quietly, did not always make sense, laughed without being addressed, appeared to be talking to people who were not there, made sounds like a

---

[2] Kwon testified that three days prior Medina had also entered the store and taken a soda without paying.

robot or machine, and alternated between being cooperative and belligerent.

DISCUSSION

1. Mental Health Diversion

Section 1001.36 authorizes pretrial diversion for defendants with mental disorders. "'[P]retrial diversion' means the postponement of prosecution, either temporarily or permanently, at any point in the judicial process from the point at which the accused is charged until adjudication, to allow the defendant to undergo mental health treatment . . . ." (§ 1001.36, subd. (c).)

A trial court may grant pretrial diversion under section 1001.36 if the court finds: (1) the defendant suffers from an identified mental disorder; (2) the mental disorder was a significant factor in the commission of the charged offense; (3) the defendant's symptoms will respond to treatment; (4) the defendant consents to diversion and the defendant waives his or her speedy trial rights; (5) the defendant agrees to comply with the treatment; and (6) the defendant will not pose an unreasonable risk of danger to public safety, as defined in section 1170.18, if treated in the community. (§ 1001.36, subd. (b).)

If the trial court grants pretrial diversion, "[t]he defendant may be referred to a program of mental health treatment utilizing existing inpatient or outpatient mental health resources" for "no longer than two years." (§ 1001.36, subds. (c)(1)(B) & (c)(3).) If the defendant performs "satisfactorily in diversion, at the end of the period of diversion, the court shall dismiss the defendant's criminal charges that were the subject of

the criminal proceedings at the time of the initial diversion." (§ 1001.36, subd. (e).)

Medina argues section 1001.36 applies retroactively because the statute has an ameliorative effect on punishment. The People contend Medina is incorrect because the Legislature did not intend the statute to apply retroactively. We agree with Medina.

As a canon of statutory interpretation, we generally presume laws apply prospectively rather than retroactively. (*People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 307 (*Lara*).) However, the Legislature may explicitly or implicitly enact laws that apply retroactively. (*Ibid.*) To determine whether a law applies retroactively, we must determine the Legislature's intent. (*Ibid.*)

"'When the Legislature amends a statute to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply. The amendatory act imposing the lighter punishment can be applied constitutionally to acts committed before its passage provided the judgment convicting the defendant of the act is not final.'" (*Lara*, *supra*, 4 Cal.5th at p. 307, quoting *In re Estrada* (1965) 63 Cal.2d 740, 745 (*Estrada*).) "'The *Estrada* rule rests on an inference that, in the absence of contrary indications, a legislative body ordinarily intends for ameliorative changes to the criminal law to extend as broadly as possible, distinguishing only as necessary between sentences that

are final and sentences that are not.' [Citations.]" (*Lara*, *supra*, 4 Cal.5th at p. 308.)

The *Estrada* rule applies to section 1001.36 because section 1001.36 lessens punishment by giving defendants the possibility of diversion and then dismissal of criminal charges. (*People v. Frahs* (2018) 27 Cal.App.5th 784, 791, review granted Dec. 27, 2018, S252220 (*Frahs*).) In addition, applying section 1001.36 retroactively is consistent with the statute's purpose, which is to promote "[i]ncreased diversion of individuals with mental disorders to mitigate the individuals' entry and reentry into the criminal justice system while protecting public safety." (§1001.35, subd. (a).)

The statute's definition of pretrial diversion, which indicates the statute applies at any point in a prosecution from accusation to adjudication (§ 1001.36, subd. (c)), does not compel a different conclusion. "The fact that mental health diversion is available only up until the time that a defendant's case is 'adjudicated' is simply how this particular diversion program is ordinarily designed to operate. Indeed, the fact that a juvenile transfer hearing under Proposition 57 ordinarily occurs prior to the attachment of jeopardy, did not prevent the Supreme Court in *Lara*, *supra*, 4 Cal.5th 299, from finding that such a hearing must be made available to all defendants whose convictions are not yet final on appeal." (*Frahs*, *supra*, 27 Cal.App.5th at p. 791.) Furthermore, the California Supreme Court decided *Lara* before the Legislature passed section 1001.36 and the Legislature is deemed to have been aware of the decision. (*People v. Overstreet* (1986) 42 Cal.3d 891, 897.) Had the Legislature intended for the courts to treat section 1001.36 in a different manner, we would expect the Legislature to have expressed this intent clearly, not

subtly. (See *In re Pedro T.* (1994) 8 Cal.4th 1041, 1049 [to counter the *Estrada* rule, the Legislature must "demonstrate its intention with sufficient clarity that a reviewing court can discern and effectuate it"].) Consequently, we conclude section 1001.36 applies retroactively to this case.[3]

This conclusion does not, however, end our inquiry. Effective January 1, 2019, section 1001.36 provides, "At any stage of the proceedings, the court *may* require the defendant to make a prima facie showing that the defendant will meet the minimum requirements of eligibility for diversion and that the defendant and the offense are suitable for diversion. The hearing on the prima facie showing shall be informal and may proceed on offers of proof, reliable hearsay, and argument of counsel. If a prima facie showing is not made, the court may summarily deny the

---

[3] Every appellate court decision that has considered the retroactivity of section 1001.36, except for two decisions (one published, one not published) from the Fifth District Court of Appeal, has agreed with the analysis of the *Frahs* court. In the Fifth District's recently-published opinion, *People v. Craine* (2019) 35 Cal.App.5th 744 (*Craine*), the court disagreed with the *Frahs* court's analysis, concluding "the text of section 1001.36 and its legislative history contraindicate a retroactive intent with regard to defendants . . . who have already been found guilty of the crimes for which they were charged." (*Craine*, *supra*, 35 Cal.App.5th at p. 749.) Because the Supreme Court has granted review of *Frahs* to decide whether section 1001.36 applies retroactively, we need not address *Craine* in detail. Suffice it to say we are unconvinced by the court's analysis, and agree with the *Frahs* court that the Legislature implicitly intended section 1001.36 to apply retroactively to all defendants whose judgments are not yet final.

request for diversion or grant any other relief as may be deemed appropriate." (§ 1001.36, subd. (b)(3), italics added.)

Based on this provision, the People contend remanding the case to allow the court to exercise its discretion is unnecessary because Medina has not established she can make the requisite prima facie showing. We find this contention unpersuasive for two reasons. First, the prima facie showing provision is discretionary, not mandatory. (§ 1001.36, subd. (b)(3) ["the court *may* require the defendant to make a prima facie showing . . . ." Italics added].) Second, the purpose of the provision is to determine whether a defendant is potentially eligible for diversion. (See Sen. Rules Com., Off. of Sen. Floor Analyses, Unfinished Business Analysis of Sen. Bill No. 215 (2017-2018 Reg. Sess.) as amended August 23, 2018, p. 2 [the prima facie showing provision "[a]uthorizes a court to request a prima facie hearing where a defendant must show they are potentially eligible for diversion"].)

In this case, officers testified Medina's behavior the day of the crime was erratic in a manner consistent with schizophrenia. The record also shows that in 2015 a mental health expert opined Medina was incompetent to stand trial because of schizophrenia with complex delusions. Additionally, the court, which expressed concerns about Medina's mental health and imposed ODR, clearly believed mental health diversion was the proper course for Medina. Medina's history of mental illness, the testimony describing her behavior the day of the offense, and the court's observations establish her potential eligibility for diversion.

We conditionally reverse the judgment to allow the trial court to determine whether Medina qualifies for diversion and, if

so, to then proceed according to the procedures set forth in section 1001.36.[4]

[4] Since we conditionally reverse on the mental health diversion issue, we do not address Medina's argument that the trial court violated due process by imposing assessments and a restitution fine without holding a hearing on ability to pay. On remand, the court may consider the full range of options available to it at that time, including Medina's ability to pay court fees under *People v. Dueñas* (2019) 30 Cal.App.5th 1157.

DISPOSITION

The judgment is conditionally reversed. The cause is remanded to the trial court with directions to conduct a diversion eligibility hearing under section 1001.36. If the court determines Medina qualifies for diversion under section 1001.36, it may grant diversion. If Medina successfully completes diversion, then the court shall dismiss the charges. If, however, the trial court determines Medina is ineligible for diversion under section 1001.36, or if she does not successfully complete diversion, then the court shall reinstate the judgment.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

CURREY, J.

WE CONCUR:

WILLHITE, Acting P. J.

COLLINS, J.